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INTRAKOTA CONSOLIDATED BHD

v.

MOHAMAD ROSLIN MD SHAH & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[COURT NO: R1-25-212-04]
4 FEBRUARY 2008

C ***LABOUR LAW:*** *Industrial Court - Award - Findings - Whether charge defective and bad in law for want of material particulars - Whether charge highly prejudicial to Claimant's defence - Whether Industrial court acted in excess of jurisdiction in refusing to consider merits of employee's termination*

D ***LABOUR LAW:*** *Industrial Court - Industrial dispute - Charge - Whether employee to know with certainty charge levelled against him - Whether charge to contain all material particulars to allow employee to prepare and conduct his defence*

E The 1st respondent was employed as a bus driver in the applicant company. The applicant carried out an investigation on 7 April 2000 on Bus Route 24 to verify complaints received from the passengers in the Ampang area that the applicant's drivers were receiving fares from passengers without issuing tickets. The F applicant then alleged that the 1st respondent had on 7 April 2000 instructed a passenger to hand over a RM2 note bearing serial number DW 3273427 being the said passenger's fare to a friend of the 1st respondent while driving bus number WFK 2526. The 1st respondent was required to attend a Domestic Inquiry G ("DI") where he was found guilty of the charge proffered against him and was dismissed from service. The learned Chairman of the Industrial Court made a decision in favour of the 1st respondent and held that he had been dismissed without just cause or excuse since the findings of the Panel of the DI were erroneous for being H based on a charge which was "defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence of the claimant". According to the learned Chairman, the identity of the said passenger and friend should have been disclosed in the charge. The learned Chairman also held that there

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was no need to look into the merits of his termination as the basis of his termination was fundamentally flawed from the beginning. Being dissatisfied with the award, the applicant sought an order of *certiorari* to quash it.

Held (dismissing the applicant's application for judicial review with costs):

(1) There was nothing perverse in the rationale nor did the learned Chairman act in excess of jurisdiction when he found it not necessary to look into the merits of the applicant's termination. (para 12)

(2) The material particulars as to time, place and identity of persons referred to in the charge were essential to enable the 1st respondent to know with certainty the charge levelled against him and to allow him to prepare and conduct his defence. (para 15)

Case(s) referred to:

Esso Production Malaysia Inc v. Maimunah Ahmad & Anor [2002] 3 CLJ 242 CA ***(refd)***

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Gardenia Bakeries (KL) Sdn Bhd v. Gunasegaran Ramasamy [2004] 2 ILR 586 ***(refd)***

Gardenia Sales & Distribution Sdn Bhd v. Tee Che Kiong [2002] 3 ILR 1075 ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30 FC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeal [1997] 1 CLJ 665 CA ***(refd)***

I Bhd v. K A Sandurannehru Ratnam & Anor [2004] 5 CLJ 460 HC ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***

Simex Marketing Sdn Bhd lwn. Abdul Manap Baba [2005] 3 ILR 21 ***(refd)***

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 30(5)

Rules of the High Court 1980, O. 53 r. 5(3)

For the appellant - Ms Rajeswari; M/s Zul Rafique & Partners

For the 1st respondent - En Mahadi; M/s Mahadi Redzuan & Co

Reported by Amutha Suppayah

JUDGMENT

Lau Bee Lan J:

[1] By the applicant's application for judicial review (encl. 1), the applicant is essentially seeking for an order of *certiorari* to quash Industrial Court Award No. 905 of 2004 dated 28 July 2004 in Industrial Court Case No. 19/4 – 320/02 after obtaining the prerequisite leave on 14 March 2005.

[2] The 1st respondent was employed as a bus driver in the Operations Division of the applicant company and at the time of his dismissal on 22 June 2000, he was drawing a basic salary of RM883.52 per month plus a fix laundry allowance of RM40 per month and was paid overtime claims which are subjected to the hours of work in excess of hours stipulated in his contract of employment. The applicant carried out an investigation on 7 April 2000 on Bus Route 24 to verify complaints received from the passengers in the Ampang area that the applicant's drivers were receiving fares from passengers without issuing tickets. After the conclusion of the investigation, the 1st respondent was required to attend a Domestic Inquiry ("DI") which eventually commenced proceedings on 24 May 2000 to answer the following charge:

> Bahawasanya saudara Mohamad Roslin bin Md. Shah (02987), seorang petugas dalam perkhidmatan Intrakota Consolidated Berhad, telah melakukan salah laku mengarah penumpang memberi wang kertas RM2.00 No. Siri DW 3273427 yang merupakan tambang penumpang tersebut kepada rakan saudara semasa menjalankan tugas memandu bas WFK 2526 pada 7 April 2000.

At the conclusion of the DI, the Panel of the DI found the 1st respondent guilty of the charge proffered against him. Based on the findings and recommendation of the Panel of the DI, the applicant dismissed the 1st respondent from service with effect from 22 June 2000 *vide* a notice of termination dated 20 June 2000 (p. 64 of encl. 3, affidavit of Abdul Latif Abdul Aziz, affirmed on 20 September 2004). Pursuant to representations made by the 1st respondent under s. 20 of the Industrial Relations Act 1967 (Act 177) ("the Act"), the Minister of Human Resources referred the matter to the 2nd respondent ie, the Industrial Court.

The learned Chairman of the Industrial Court made a decision in favour of the 1st respondent and held that the first respondent had been dismissed without just cause or excuse since the findings of the Panel of the DI were erroneous for being based on a charge which is "defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence of the claimant" following the Court of Appeal authority of *Esso Production (M) Inc. v. Maimunah bte Ahmad & Anor* [2002] 2 MLJ 458 and further "there is no need to look into the merits of his termination as the basis of his termination is fundamentally flawed from the beginning" ("the impugned award"). Being dissatisfied with the impugned award, the applicant now seeks to quash it.

[3] Pursuant to the statement under O. 53 r. 5(3) of the Rules of High Court 1980 ("the RHC") dated 20 September 2004 (encl. 2) the applicant raised four (4) errors of the Industrial Court. However in her written submission dated 16 January 2007, learned counsel for the applicant, Ms. Rajeswari submitted that the grounds can be summarized to two (2) main arguments:

(i) Whether the Industrial Court had given a narrow and pedantic interpretation to the case of *Esso Production (M) Inc. v. Maimunah bte Ahmad & Anor* [2002] 2 MLJ 458 and thereby abdicated its duties under s. 20 of the Industrial Relations Act 1967; and

(ii) Whether the Industrial Court in handing down its decision based on the narrow and pedantic application of the case of *Esso Production (M) Inc. v. Maimunah bte Ahmad & Anor* [2002] 2 MLJ 458, had failed to consider and apply the principles enunciated in the Supreme Court case of *Dreamland Corp (M) Sdn. Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39

[4] Before I delve into the 1st line of argument, for comprehension of the arguments, it is appropriate for me to reproduce below the reasons and findings of the learned Chairman of the Industrial Court at pp. 6-10 of the impugned award when deliberating the 1st respondent's submission that the charge preferred against him was defective for want of particulars in relation to the "penumpang", "rakan saudara", "the time of the alleged offence" or "the place where the alleged offence was committed":

A In this case there is no dispute that the dismissal of the Claimant was grounded upon the findings of the internal board of inquiry that the charge against the Claimant had been proven. That being the threshold of the Claimant's termination, hence the validity of the charge proferred against the Claimant is of prime importance. It is the pivotal issue.

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The charge levelled against the Claimant is obviously criminal or semi criminal in nature. Though it does not impose an additional burden, nevertheless the Company is under a legal duty that the charge proferred has to positively and precisely state the offence C the Claimant is alleged to have committed so that he knows with what he is charged and may be prepared to answer the charge in the best way possible. The chare is precisely a notice to the offender of the matter with which he is accused of. Additionally, to borrow the position in terms of its phraseology from *Jager Singh v. PP* [1936] MLJ Rep. 92, which I find to be equally D applicable in his proceedings:

> *The charge … must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself …*

E Since the charge against the Claimant is criminal or semi criminal in nature, in my view there is thus clearly a specific duty imposed on the Company to particularized the charge sufficiently so as to give adequate notice to the Claimant and consequently to enable him to adequately prepare and conduct his defense notwithstanding F that the Industrial Court should not be too bogged down with legal technicalities or form.

Adverting to the case before me, I am of the view that the charge as proferred are defective and bad in law for non-disclosure of material particulars as complained by the Claimant. On the same G account it is also highly prejudicial to the Claimant's defence. Since the Claimant was accused of directing the *penumpang* to pay his bus fare to the Claimant's *rakan,* it is only proper that the identity of the said *penumpang* and *rakan* should be disclosed in the charge. God knows how many *penumpang* has embarked and disembarked from his bus since he took over duties on that day. H Therefore in such event the need to identify which *penumpang* in issue is very real. The non disclosure of the identify of the said *penumpang* is certain to hamper the adequacy of the Claimant's defence for he would be placed in limbo to conjecture which particular *penumpang* was meant by the Company. The same I equally applies to the non-disclosure of said *rakan* and the time and place where the alleged offence was committed. Only God

knows how many *rakan* the Claimant has brought along in his bus that day. Or which *rakan* is the relevant *rakan* in issue. These are facts well within the knowledge of the Company. It may well be that it is also within the personal knowledge of the Claimant, but it is not for the Claimant to fill in the gaps. The duty is upon the Company to profer a charge which is clear and unambiguous to enable the Claimant to know with what he is being charged for and may be prepared to answer the charge in the best way possible. It is for the Company to lay all the bare facts as the burden is always upon the Company to show by evidence that the excuse or reasons given to terminate the Claimant's employment has been made out or proven.

In *Esso Production Malaysia Inc. v. Maimunah Ahmad & Anor* [2002] 3 CLJ 242, Abdul Kadir Sulaiman JCA at page 248 said:

> *The validity or otherwise of the charges is the threshold of the matter before the merit could be considered. Looking at the two charges as they stood, we would not hesitate to say that they are bad and the learned judge was therefore, correct when he said that such charges for want of material particulars is void ab initio. With that we agree with the learned judge that on such improper charges before the board of inquiry, the finding of guilt upon the first respondent could not stand, thereby rendering the dismissal of the first respondent by the appellant to be without just cause or excuse and therefore, unlawful. On this ground alone, this appeal of the appellant against the decision of learned judge ought to be dismissed.*

For the reasons given, it is my findings that the charges against the Claimant are defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence of the Claimant. Their consequential effects are very obvious. As said Abdul Kadir Sulaiman JCA in *Esso Production Malaysia Inc. (supra)*:

> A proper tribunal having to decide on such bad charges would not have come to the conclusion arrived at by the board of inquiry of the appellant.

Since the basis of the finding of the board of inquiry is erroneous, its findings could not have therefore, formed the basis to terminate the Claimant's employment. Since this is the reason given by the Company for terminating the Claimant's employment, his termination is clearly without any just cause or excuses. Plainly, the termination of the Claimant is unlawful. That being so, following *Esso Production Malaysia Inc. (supra)*, there is no need to look into the merits of his termination as the basis of his termination is fundamentally flawed from the beginning.

[5] Perusing the four (4) errors identified in the statement, I see no reason to depart from the approach taken by the learned counsel for the applicant. Under the 1st line of argument, the learned counsel for the applicant contends that the rationale of the learned Chairman of the Industrial Court to refuse to look into the merits of the 1st respondent's termination is perverse and in excess of its jurisdiction which warrants interference of this court basically on the following grounds:

(a) the Industrial Court cannot abdicate its functions under s. 20 of the Act to inquire into the merits of the dismissal on the strength of the Federal Court cases of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30, *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal* [1995] 3 CLJ 344 at p. 352 f-g; and *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449.

(b) The learned Industrial Court Chairman placed much emphasis on the Court of Appeal decision in *Esso Production Malaysia (supra)* but "failed to act towards the fidelity of the principle set out in the (case)" for primarily three (3) main reasons. The 1st reason for purposes of clarity, I shall reproduce the material parts thereof:

(i) In the case of *Esso Production Malaysia Inc*, all material particulars including date, time and place of the offence were omitted from the charge and hence the rationale was that the employee was not able to know when the alleged offences were committed by her. As such, the court in that case ruled that the charge was *void ab initio*.

[6] Learned counsel for the applicant contends that in the instant case, the 1st respondent "not only knew the date, time and place referred to in the charge but also knew who his "rakan saudara" was based on the following evidence:

(a) The first respondent's police report dated 17.6.2000 where he stated: [see page 26 annexed to Exhibit AL-3 of the Applicant's Affidavit No.1]

Pada **07/04/2000 jam lebih kurang 10.15 malam, saya sedang memandu bas no. WFK 2526 Laluan No. 24 C** bersama seorang penyelia nama En. Fadhil. Selepas itu, dia mengarahkan saya balik ke Depoh di Pandan Indah. Semasa di situ saya disoal siasat bersama seorang **penumpang yang**

saya kenali. Pengurus saya nama En. Awalluddin menyuruh saya keluarkan dompet dan menunjukkan duit jumlah RM 2.00. **Didapati, duit itu berada dengan penumpang yang saya kenali itu** dan salinan Photostat duit itu ada dengan penyelia saya.

(b) The First Respondent's admission during his cross-examination: (see page 27 annexed to Exhibit Al-9 of Applicant's Affidavit No. 2)

Q: Dalam laporan ini awak menyatakan awak kenal penumpang tersebut.

A: Ya.

Q: Dalam laporan polis ini awak kata lelaki ini adalah rakan awak.

A: Ya.

[7] It is to be noted a similar line of argument was canvassed by the learned counsel for the appellant in *Esso Production (supra)* when His Lordship Abdul Kadir Sulaiman JCA (as he then was) stated at p. 462 F-G "Before us, the learned counsel for the appellant contends that this issue was irrelevant for the learned judge to consider because the first respondent admitted and did not dispute either during the domestic inquiry or during the proceedings before the second respondent that she had received RM400 in the form of a cheque from Haji Aladdin, which she cashed and therefore, the merits should be considered. We do not think that we could agree with the contention of the learned counsel" and at p. 463 G-H "Hence, the substance relating to the two charges cannot be brushed aside as being of no significance. Taking the words of the learned counsel for the appellant in his submission that the first respondent admitted and did not dispute, either during the domestic inquiry or during the proceedings before the second respondent, that she had received the money and cashed it, and there was also in the evidence a statement recorded from her during the investigation stage. At least from the purported statement, surely the date, time and place the offences were alleged to have been committed would have been known to enable proper charges to be framed against her" and there was also in the evidence a statement recorded from her during the investigation stage. At least from the purported statement, surely the date, time and place the offences were alleged to have been committed would have been known to enable

A proper charges to be framed against her". (Emphasis added). In dismissing the arguments of the appellant in *Esso Production (supra)*, His Lordship at p. 463 E to G opined "So, the validity or otherwise of the charges put before the internal board of inquiry is the pivotal issue in this matter. The issue being one of law, the B learned judge is correct when he said that it could be raised at any stage of the proceedings in the matter. Looking at the two charges labeled against the first respondent during the inquiry leading to the findings of the board, resulting in the dismissal of the first respondent by the appellant, they are indeed criminal or C at least semi-criminal in nature, the consequence of which would deprive the first respondent of her right to livelihood as indeed had happened to her by being dismissed from her employment with the appellant (see *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665) and further on the same D p. I to p. 464 A-C "On the two charges, the burden is on the party that alleges to satisfy the tribunal adjudicating the matter that the charges had been proved before the first respondent could be condemned. They are material particulars required to be disclosed in the charges. Without that, how would one accused E upon the charges be able to prepare proper defences to them. Simply upon the admission and non-dispute either during the domestic inquiry or during the proceedings before the second respondent would not entitle the learned judge of the High Court in this instance, to proceed to consider the merits of the case. F The validity or otherwise of the charges is the threshold of the matter before the merits could be considered. Looking at the two charges as they stood, we would not hesitate to say that they are bad and the learned judge was therefore, correct when he said that such charges for want of the material particulars is *void ab* G *initio*. With that, we agree with the learned judge that on such improper charges before the board of inquiry, the finding of guilt upon the first respondent could not stand thereby rendering the dismissal of the first respondent by the appellant to be without just cause or excuse and therefore, unlawful. On this ground H alone, this appeal of the appellant against the decision of the learned judge ought to be dismissed".

[8] Following the reasoning in *Esso Production (M) Inc. (supra)* where the Court of Appeal did find not favour with the arguments I of the appellant and which argument as I have alluded similarly formed the basis of the learned counsel for the applicant's contention that the learned Chairman has erred in refusing to look

into the merits of the 1st respondent's termination, I am likewise of the view that the contention of the applicant cannot be sustained.

[9] The 2nd reason submitted on applicant's behalf to support the 1st line of argument is the contention that the "learned Chairman erred in law and fact when he concluded the non disclosure of all the relevant particulars prejudiced the first respondent's defence particularly when he choose *(sic)* not to give any defence at all before the inquiry".

I am of the view that this contention cannot hold water for the same reasons referred to in paras 7 and 8 above.

[10] The 3rd reason advanced on behalf of the applicant in support of the 1st line of argument is learned counsel's contention "by applying the principle of *Esso Production (M) Inc.* in a dogmatic manner, the learned Chairman … acted in defiance of the express wordings of s. 30(5) of the [Act]" and to support this proposition, the cases of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 (CA) at p. 322 g to i through p. 323 a and *I Bhd v. K A Sandurannehru Ratnam & Anor* [2004] 5 CLJ 460 (HC) at p. 464 d-h and at p. 465 c. It is my view that the argument of the applicant is flawed because it is patently clear that both the aforesaid authorities can be distinguished as they pertain to the question of the applicable standard of proof and not a question of pivotal and threshold issue of the validity or otherwise of the charges before the D.I. as in the present matter.

In the *Telekom Malaysia Kawasan Utara* case *(supra)*, this fact is borne out when Abdul Hamid Mohamad JCA (now Chief Justice Malaysia) at p. 317 f-g stated "Simply put, the question (before the Court of Appeal) is: when an employee is dismissed on the ground that he has committed an act of dishonesty like "theft" of the employer's property, must the "offence" be proved beyond reasonable doubt as in a criminal prosecution in the court of law" (Emphasis added). Similarly in *I Bhd. (supra)*, at p. 462 f-g, His Lordship, Balia Yusof JC (now High Court Judge) stated "I find that in a nutshell it is essentially the issue of standard of proof that forms the basis of this application".

[11] Apart from the arguments put forth by the learned counsel for the applicant which regrettably I cannot agree for the reasons given, there is an additional reason which I find justifies why the learned Chairman of the Industrial Court was correct in refraining from proceeding to consider the merits of the case. It is to be observed that it did not escape the attention of the Court of Appeal in *Esso Production (M) Inc. (supra)* that "[I]n the proceedings before the second respondent (Industrial Court) resulting in the impugned award, as the issue of the defective charges was never an issue, the second respondent decided the matter on the merits based on the evidence tendered before him" and therefore substantiated with reference to p. 14 of the impugned award (see p. 464 C-E). Despite this Abdul Kadir Sulaiman JCA (as he then was) stated at p. 462 G left, after the counsel for the appellant's submission that the merits of the case ought to be considered as per para 7 at p. 10 line 23 to p. 11 line 7 above, "We do not think that we could agree with the contention of the learned counsel"; and further in retort to again counsel for the appellant's contention, at p. 463 I right, stated "Simply upon the admission and non-dispute either during the domestic inquiry or during the proceedings before the second respondent [I.C] would not entitle the learned judge of the High Court in this instance, to proceed to consider the merits of the case".

[12] For the reasons proferred, I hold there is nothing perverse in the rationale nor did the learned Chairman of the Industrial Court acted in excess of jurisdiction when he found it not necessary to look into the merits of the applicant's termination. Hence, my answer to the 1st line of argument is in the negative.

[13] I now turn to the 2nd line of argument wherein learned counsel for the applicant contends there is failure on the part of the learned Industrial Court Chairman to consider and apply the principles enunciated in *Dreamland Corporation (supra)*. In this regard learned counsel submitted "[T]here is a consistent body of authorities which state that the initial defect in natural justice in not holding a domestic inquiry is cured by the inquiry held by the Industrial Court which provides a better and impartial forum for an employee to state his defence". The "consistent body of authorities" meant by the learned counsel are *Dreamland Corp (SC) (supra), Hong Leong Assurance (supra)* (FC) and endorsed in *Milan Auto Sdn Bhd (FC) (supra)*. Learned counsel further contends

"[N]otwithstanding the fact that there is a consistent body of authorities that state that the initial defect of an internal inquiry or not having a inquiry is curable in the Industrial Court, the very fact that the learned Chairman of the Industrial Court said there is no need to inquire the merits of the case because not all particulars were furnished to the first respondent certainly makes the principles in landmark cases such as *Dreamland Corp (M) Sdn Bhd, Wong Yuen Hock* and *Milan Auto* "superfluous".

[14] On the strength of the high authority cited by learned counsel for the applicant, I accept that these authorities support the proposition that "the initial defect in natural justice in not holding a domestic inquiry is cured by the inquiry held by the Industrial Court which provides a better and impartial forum for an employee to state his defence". However in my view, these authorities cannot be extended to cure a defect involving the issue of the validity or otherwise of a charge(s) before the D.I. and which impinges a "pivotal" and "threshold" issue. To do so would be stretching the *ratio decidendi* of the authorities thereto if one is to examine the passages cited by learned counsel for the applicant in *Dreamland Corp (supra)* (p. 114 H-I); *Hong Leong Assurance (supra)* (p. 354 h-I through p. 355 a; p. 356 e to f); in *Milan Auto Sdn Bhd (supra)*. Since this body of authorities represents the law that the initial defect of an internal inquiry or not having an inquiry is curable in the Industrial Court, I find the contention of the learned counsel for the applicant that these cases are rendered "superfluous" just because the learned Chairman of the Industrial Court stated there is no need to inquire into the merits of the case flawed.

[15] With due respect to the learned applicant counsel, I cannot agree with her contention that "the effect of upholding the decision of the learned Chairman of the Industrial Court is to place an employer who chooses not to afford his employee an opportunity to be heard in a better position than an employer who attempts to afford his employee an opportunity to be heard but who are layman unskilled in the technical niceties of framing a comprehensive charge". What is of particular importance is the validity of the charge preferred against the 1st respondent and therefore material particulars as to time, place and identity of persons referred to in the charge are essential to enable the 1st respondent to know with certainty the charge levelled against him

and to allow him to prepare and conduct his defence; as the learned Chairman stated at p. 8 of the impugned award, "It may well be that it is also within the personal knowledge of the claimant (1st respondent), but it is not for the claimant to fill in the gaps … It is for the company to lay all the bare facts as the burden is always upon the company to show by evidence that the excuse or reasons given to terminate the claimant's employment has been made out or proven". This approach is in accordance with the legal principles enunciated in the off-cited cases of *Goon Kwee Phoy (supra)*, *Hong Leong Assurance (supra)* and *Milan Auto Sdn Bhd (supra)*. For the reasons stated, my answer to the 2nd line of argument is in the negative.

[16] On a final note, learned counsel for the applicant had referred the court to three (3) Industrial Court Awards post – *Esso Production (M) Inc. (supra)* where the Industrial Court had looked into the merits of the reference notwithstanding the charge being defective. These awards are *Gardenia Sales & Distribution Sdn Bhd v. Tee Che Kiong* [2002] 3 ILR 1075, *Gardenia Bakeries (KL) Sdn Bhd v. Gunasegaran Ramasamy* [2004] 2 ILR 586 and *Simex Marketing Sdn Bhd lwn. Abdul Manap Baba* [2005] 3 ILR 21. I agree with the learned counsel for the 1st respondent that these awards are not binding on this court. In addition it is interesting to note the following note at p. 460 G in *Esso Production (M) Inc. (supra)* "[Editorial Note: The appellant's application for leave to appeal to the Federal Court (before Ahmad Fairuz Chief Judge (Malaya), Siti Normah Yaakob and Mokhtar Abdullah FCJJ) was dismissed with costs on 22 April 2002]". What can be inferred is that the principles enunciated in *Esso Production (M) Inc. (supra)* is still good law.

[17] For the foregoing reasons, the applicant's substantive application for judicial review dated 18 March 2005 (encl. 8) is dismissed with costs.